

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

THOMAS J. DUFF, Plaintiff, v. GOVERNOR KIMBERLY K. REYNOLDS, GLEN DICKINSON, LESLIE HICKEY, and DAN HUITINK, Defendants.	Case No. CVCV058894 ORDER ON MOTION TO DISMISS AND ON MOTION FOR TEMPORARY INJUNCTION
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On September 11, 2019, the Plaintiff, Thomas J. Duff (“Duff”) filed a Petition and Application for Injunctive Relief. On October 4, 2019, the Defendants (collectively “the State”) filed a Motion to Dismiss. On October 11, 2019, the Court held a contested hearing on both the Application for Temporary Injunctive Relief and the Motion to Dismiss. Attorney Robert Rush appeared on behalf of Duff. Assistant Attorney General David Ranscht appeared on behalf of the State. Having considered the court file, filings of the parties, and arguments of counsel, the Court enters the following ruling.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 8, 2019, Governor Reynolds signed into law Senate File 638 (hereinafter “SF 638”). Titled, “An Act relating to state and local finances by making appropriations, providing for legal and regulatory responsibilities, providing for other properly related matters, and including effective date, applicability, and retroactive applicability provisions”, SF 638 provides in relevant part to these proceedings:

JUDICIAL NOMINATING COMMISSION MODERNIZATION**46.1 Appointment of state judicial nominating commissioners.**

1. The governor shall appoint, subject to confirmation by the senate, nine eligible electors to the state judicial nominating commission.

2. The appointments made by the governor shall be staggered terms of six years each and shall begin and end in even-numbered years as provided in section 69.19. The terms of no more than three nor less than two of the commissioners shall expire within the same two-year period.
3. No more than a simple majority of the commissioners appointed by the governor shall be of the same gender.
4. All commissioners shall be chosen without reference to political affiliation.
5. There shall be at least one commissioner appointed by the governor from each congressional district and there shall not be more than two commissioners appointed by the governor from a single congressional district unless each congressional district has at least two commissioners appointed by the governor.
6. A commissioner who has served a full six-year term on the state judicial nominating commission, whether the commissioner was appointed or elected, shall be ineligible to be appointed to a second six-year term.
7. No person may be appointed who holds an office of profit of the United States or of the state at the time of appointment.

46.6 Chairperson.

1. The commissioners of the state judicial nominating commission shall elect a chairperson from their own number. The chairperson shall serve a two-year term that expires on April 30 of even-numbered years. A commissioner may be reelected for a second or third term as chairperson. If a chairperson of a judicial nominating commission desires to be relieved of the duties of chairperson while retaining the status of commissioner, the chairperson shall notify the governor and the other commissioners of the commission. At the next meeting of the commission, the commissioners shall elect a new chairperson for the remainder of the two-year term.
2. The judge of longest service in the district shall serve as the chair of a particular district judicial nominating commission. If the judges of longest service in the district are of equal service, the eldest of such judges shall be chairperson of the particular judicial nominating commission.

DIVISION XIV. CHIEF JUSTICE SELECTION

1. At the first meeting in each odd-number year, the justices of the supreme court by majority vote shall designate one justice as chief justice, to serve for a two-year term. A vacancy in the office of chief justice shall be filled for the remainder of the unexpired term by a majority vote of the justices of the supreme court, after any vacancy on the court has been filled.

2. If the chief justice desires to be relieved of the duties while retaining the status of justice of the supreme court, the chief justice shall notify the governor and the other justices of the supreme court. The office of chief justice shall be deemed vacant, and shall be filled as provided in this section.

3. The chief justice is eligible for reselection.

4. The chief justice shall appoint one of the other justices to act during the absence or inability of the chief justice to act during the absence or inability of the chief justice to act, and when so acting the appointee has all the rights, duties, and powers of the chief justice.

Sec. 62. NEW SECTION. 602.4103A Transition provisions.

1. The term of the chief justice serving on the effective date of this division of this Act shall expire on January 15, 2021, or upon the conclusion of the first meeting of the justices of the supreme court in January 2021, whichever occurs earlier.

2. If the office of the chief justice becomes vacant prior to the expiration of the term in January 2021, the office shall be filled for the remainder of the unexpired term as provided for in section 602.4103.

3. This section is repealed July 1, 2021.

SF 638, Divisions XIII and XIV (2019).

SF 638, otherwise a “Standings Bill” providing for appropriations commonly passed at the end of the legislative session, was amended during debate to add the above provisions which make changes to how the members of the State Judicial Nominating Commission (“the Nominating Commission”) are selected, and the process by which the Chief Justice of the Iowa Supreme Court is selected, as well as the term of office the Chief Justice serves. That amendment (H-1321) was filed at 12:29 a.m. on April 27, 2019. By 2:22 p.m. on that same day, SF 638, as amended, had passed both the Iowa House and Senate, without any change to the title of the act. Governor Reynolds then signed SF 638 into law on May 8, 2019. The law, by its terms, went into effect immediately. On May 10, 2019, pursuant to the mandate of SF 638, Governor Reynolds appointed Dan Huitink as the ninth gubernatorial appointment to the Nominating Commission, replacing the senior Supreme Court Justice on the Nominating Commission.

On July 1, 2019, Iowa Court of Appeals Judge Gayle Vogel retired, leaving a vacancy on the Iowa Court of Appeals. Duff, an Iowa attorney, applied to fill the vacancy. On August 5, 2019, Duff interviewed for the vacancy before the newly-constituted Nominating Commission. That same day, the Nominating Commission named three nominees for the Governor's consideration. Duff was not one of the nominees.

Previously, twelve plaintiffs brought suit claiming SF 638 violates Article III, Section 29 of the Iowa Constitution, and also that the provisions regarding selection of the Chief Justice violate separation of powers. The plaintiffs included Iowa residents, lawyers, legislatures, and members of the Nominating Commission. In that case, the State's Motion to Dismiss was granted on the grounds that none of the plaintiffs had standing. *Rush et al v. Reynolds et al*, Case No. CVCV058127 (J. Crane June 27, 2019). That ruling is now on appeal. Duff now seeks the same relief as the twelve prior plaintiffs, but this time as a prior unsuccessful applicant before the Nominating Commission as well as as an Iowa lawyer. As before, the State moves to dismiss his challenge for lack of standing.

II. MOTION TO DISMISS STANDARD

Iowa law makes clear that when reviewing a pre-answer motion to dismiss the Court is to accept the facts alleged in a petition as true. *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012) (citing *McGill v. Fish*, 790 N.W.2d 113, 116 (Iowa 2010)). Granting a motion to dismiss is only proper "if the petition shows no right of recovery under any state of facts." *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d 192, 194 (Iowa 2007) (quoting *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 442 (Iowa 2002)). A standing challenge is treated as a pre-answer jurisdictional challenge. Affidavits may be considered

alongside the pleadings. *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 473 (Iowa 2004).

III. STANDING

As stated earlier, this is the second challenge to SF 638, the first having previously been dismissed by the court for lack of standing on the part of any of the plaintiffs. The State argues that Duff stands in no better position to assert standing than the previous plaintiffs. Duff asserts that he is different than all of the other plaintiffs in that he is not only an attorney in Iowa, but he is also a past unsuccessful applicant for the Iowa Court of Appeals vacancy in the summer of 2019, injured by the enforcement of SF 638. Standing means that a party has a “sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.” *Birkhofer ex rel. Johannsen v. Brammeier*, 610 N.W.2d 844, 847 (Iowa 2000) (quoting Black’s Law Dictionary 1405 (6th ed. 1990)). To establish standing a plaintiff must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected. *Id.* The two requirements are separate, independent elements that must be satisfied to confer jurisdiction. *Hawkeye Bancorporation v. Iowa College Aid Comm’n*, 360 N.W.2d 798, 801 (Iowa 1985).

A. Standing to challenge the changes to the Nominating Commission.

Counts I and II of Duff’s Petition allege that the provisions of SF 638 that made changes to the make-up of the Nominating Commission violated Article III section 29 of the Iowa Constitution. He argues that he has standing to assert these claims as an attorney-member of the Iowa Bar and as a past unsuccessful applicant before the Nominating Commission.

i. Standing as an Iowa attorney.

Duff is an attorney-member of the Iowa Bar. He asserts this membership is sufficient to confer standing as one who has the right to participate in the election of eight attorney members

of the Nominating Commission. The fact that Duff is a lawyer is insufficient, alone, to confer standing. In this regard, the court adopts the rationale used by Judge Crane in her ruling dismissing the previous challenge:

Iowa lawyers will continue to elect the same number of lawyer members for the State Judicial Nominating Commission. Attorney Plaintiffs' argument is that their votes to select the eight lawyer members have been diluted because the eight lawyer members now serve on the commission with nine appointment members instead of with eight appointed members and one justice of the Iowa Supreme Court.

Attorney Plaintiffs do not have standing. They do not assert the lawyer members have lost a right to vote. *See e.g. Carlson v. Wiggins*, 760 F.Supp.2d 811, 819 (S.D. Iowa 2011) (holding plaintiffs had standing to challenge election of lawyer members based on their allegation that they had "been denied the right to vote" but dismissing case for failure to state a claim). Attorney Plaintiffs may still cast their votes the same as before and are still able to vote for the same number of elected members of the State Judicial Nominating Commission. The United State Supreme Court cases *Raines v. Byrd* 521 U.S. 811, 826 (1997) and *Coleman v. Miller*, 307 U.S. 433 (1939) demonstrate the distinction.

In *Coleman v. Miller*, 307 U.S. 433 (1939), 20 of Kansas' 40 State Senators voted to ratify a proposed federal amendment and 20 voted not to ratify. With a tie vote, the amendment would not have been ratified. The State's Lieutenant Governor cast a deciding vote in favor of the amendment and it was ratified. The US Supreme Court found the 20 State Senators who had voted against the amendment had standing to assert the Lieutenant Governor acted illegally because they alleged their votes had been completely nullified.

In *Raines v. Byrd*, 521 U.S. 811 (1997), the U.S. Supreme Court distinguished *Coleman* and refused to find standing for legislators who asserted a line item veto act would allow the President to override their votes. The Court emphasized that the Plaintiffs had "not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Raines*, 521 U.S. at 824. The Court's language is instructive here: "There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here."

Here, unlike in *Coleman*, lawyer members have not lost their vote or had it nullified. Instead, they allege an abstract dilution of institutional power. The abstract argument requires one to assume that all appointed members will vote in concert and all attorney elected members will vote in concert.

Order Granting Motion to Dismiss and Denying Motion for Temporary Injunction, *Rush et al v. Reynolds et al*, Case No. CVCV058127 (J. Crane June 27, 2019). This court cannot confer standing solely based on Duff's profession as an Iowa lawyer.

ii. Standing as a past applicant before the state judicial nominating commission.

Unlike any of the plaintiffs in the prior challenge, Duff also asserts he has standing as an injured past applicant before the newly-constituted Nominating Commission.

Looking to the first element to establish standing requiring a specific personal or legal interest in the litigation, a plaintiff must have a “special interest in the challenged action, ‘as distinguished from a general interest.’” *Godfrey v. State*, 752 N.W.2d 413, 419 (Iowa 2008) (quoting *City of Des Moines v. PERB*, 275 N.W.2d 753, 759 (Iowa 1979)). To have a special interest, a plaintiff must have suffered some actual or threatened injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).¹ Notably, this requirement is stated in the past-tense; the injury may have been *suffered*. *Id.* Thus, the presence of a past injury is enough to confer constitutional standing. *Id.* Here, Duff alleges an actual injury, that as an applicant for the Iowa Court of Appeals, he was deprived of a full and fair consideration by a Nominating Commission made up of a Supreme Court Justice, and an equal number of elected and Governor-appointed members. Such an injury would demonstrate his interest as one with a direct stake in the

¹ The doctrine of standing in Iowa is often supplemented by federal standing law. *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 864, 869 (Iowa 2005).

outcome of this litigation rather than a generalized interest that legislation comply with the State's constitution. Duff satisfies the first element of standing.

To satisfy the second element of standing, that a plaintiff must be injuriously affected, the plaintiff must be "injured in fact." *Godfrey*, 752 N.W.2d at 419 (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 2417 n.14, 37 L. Ed. 2d 254, 270 n.14 (1973) (the second element requiring "injury in fact" "serves to distinguish a person with a direct stake in the outcome of a litigation--even though small--from a person with a mere interest in the problem"). That injury need not be monetary or some other traditional damage *Id.* at 420. Rather, "[t]his requirement recognizes the need for the litigant to show some 'specific and perceptible harm' from the challenged action, distinguished from those citizens who are outside the subject of the action but claim to be affected." *Id.* Although the two elements necessary for standing are separate requirements (*Alons*, 698 N.W.2d at 858, 864), they have much in common and often are considered together. *Godfrey*, 752 N.W.2d at 419.

The State argues that Duff cannot show that he is injured in fact because he cannot prove that, but for the changes in the make-up of the Nominating Commission brought about by the passage of SF 638, he would have been successful in his application for a seat on the Iowa Court of Appeals. This argument misses the point. Duff's injury stems from the alleged unconstitutional passage of the provisions of SF 638 that *changed* the make-up of the Nominating Commission. But for this alleged unconstitutional act, Duff's application would have been considered by a Nominating Commission made up of different members than the one that did consider it. His argument is that he interviewed with the wrong commission. It doesn't matter what votes he received or didn't receive from that commission. His injury comes from the deprivation of his opportunity to interview with and be considered by the right commission. The

court believes that is enough to show a sufficient specific personal stake in the controversy to obtain a judicial resolution. Duff has standing under Counts I and II of his Petition to challenge the provisions of SF 638 that made changes to the Nominating Commission.

B. Standing to Challenge the Election and Term of Office Served by the Chief Justice.

Count III of Duff's petition alleges that SF 638's changes to the selection and term of office of Iowa's Chief Justice violate the separation of powers set forth in the Iowa Constitution. To be found to have standing to challenge these provisions, Duff must again be specially situated and injured in-fact. Neither are true here. Duff has no different interest than any other citizen regarding the election and term of office served by the Chief Justice. The changes do not impact him directly, as he is neither a justice of the Iowa Supreme Court nor the Chief Justice. He is not a party injured by the change. His interest amounts to nothing more than a challenge for the constitutional form of governance our state constitution mandates. This generalized grievance is not enough. *See Godfrey*, 752 N.W.2d at 421 (rejecting standing "based on a general interest of a litigant in having government act pursuant to the law").

There is also no basis to allow this claim to proceed without standing under the public importance doctrine. The Iowa Supreme Court has recognized such a doctrine. *Id.* at 425 ("We believe our doctrine of standing in Iowa is not so rigid that an exception to the injury requirement could not be recognized for citizens who seek to resolve certain questions of great public importance and interest in our system of government."). But, while "an exception to standing that conforms to the underlying rationale for the doctrine should be recognized ... we cannot allow standing to transform into a loose doctrine." *Id.* Policies of standing, such as ensuring that the people most concerned with an issue are in fact the litigants of the issue, "must be kept in the forefront as we consider circumstances to support an exception or waiver of the

standing requirement.” *Id.*, at 425-26. Here, SF 638’s changes to the selection and term of office of Iowa’s Chief Justice do not change the fact that the Iowa Supreme Court will continue to have a Chief Justice or that the Court itself will continue to vote for its Chief Justice. Such circumstances do not give good reason to waive standing for someone not actually effected by the legislation.

Based on the discussion above, Duff does have standing to pursue his claims set forth in Counts I and II of his Petition. He does not have standing to pursue his claim set forth in Count III of his Petition, and that count should be dismissed.

IV. REQUEST FOR TEMPORARY INJUNCTION

The court, having determined that Duff’s claims under Counts I and II of his Petition may go forward, must now decide whether to grant his request for a temporary injunction enjoining enforcement and publication of the relevant provisions of SF 638. There are three instances in which a temporary injunction may be granted: (1) when it “pertains to an act causing great or irreparable harm”; (2) when it “pertains to a violation of a right tending to make the judgment ineffectual”; or (3) when a court is authorized by statute. *I. R. Civ. P.* 1.1502; *Max 100 L.C. v. Iowa Realty Co., Inc.*, 621 N.W.2d 178, 181 (Iowa 2001). Here, we are concerned with only the first instance. To prove he is entitled to a temporary injunction, Duff must show (1) in the absence of the injunction he will suffer irreparable harm, (2) his challenge is likely to succeed on the merits, and (3) injunctive relief is warranted considering the circumstances confronting the parties and “balanc[ing] the harm that a temporary injunction may prevent against the harm that may result from its issuance.” *Max 100 L.C.*, 621 N.W.2d at 181. All three elements must be proven. *Id.* Ultimately, “the decision to issue or refuse ‘a temporary injunction rests largely [within] the sound judgment of the trial court.’” *Id.*

A. Enjoining Enforcement of Challenged Provisions.

Duff seeks to enjoin enforcement of the provisions of SF 638 regarding changes to the Nominating Commission. Here, harm to Duff that a temporary injunction may prevent, if there be any, would be greatly outweighed by the harm that may result from its issuance.

Looking at Duff's claim that enactment of the relevant provisions of SF 638 violated Article III, section 29 of the Iowa Constitution, the court has to focus on the relief he is seeking. That section of the Iowa Constitution states:

Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act *shall be void* only as to so much thereof as shall not be expressed in the title.

Iowa Const. art. III, § 29 (emphasis added). “A successful challenge ... invalidates the defective portion of the legislation not only for the benefit of the challenger but also for the benefit of others adversely affected. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) (citing *Tabor v. State*, 519 N.W.2d 378, 380 (Iowa 1994)). Duff's Petition and affidavit allege only that he, personally, was injured as an applicant for the Iowa Court of Appeals in the summer of 2019. That position has been filled. While he argues that continued enforcement of the challenged provisions changing the make-up of the Nominating Commission will affect applicants in subsequent openings for State-wide judicial office, no such applicants or potential applicants have joined him in his suit, and he has not sued on their behalf. Nor has he made any argument that such third parties are either unlikely or unable to assert their rights. *See, Godfrey*, 752 N.W.2d at 424.

In his request for a temporary injunction, Duff does not ask the court to enjoin from acting, the Court of Appeals Judge who was appointed to the position for which he applied. Further, he does not state in his Petition or affidavit whether he ultimately seeks in this action to unseat that Judge, or only to obtain prospective relief. Either way, if his challenge is successful, he will be able to apply again and be considered by a Nominating Commission convened without the, then invalidated, provisions of SF 638, regardless of whether a temporary injunction is granted.

On the other hand, the harm caused by a temporary injunction would be that no openings for State-wide judicial office could be filled while Duff's suit is pending. *See* SF 638, sec. 59(2) (2019) ("Notwithstanding any provision of the law to the contrary, if any provision of this chapter is preliminarily enjoined, no judicial nominating commission shall meet to nominate persons to serve as a judge or justice while the preliminary injunction is in effect or while any appeal of the preliminary injunction or a related permanent injunction is pending ..."). This would include a recently announced opening on the Iowa Court of Appeals. As Duff has sued only as a party injured in his past application, enjoining the nomination of applicants while his suit is pending would serve no purpose other than to prevent the Iowa Court of Appeals or Supreme Court from having its full complement of judges or justices. The court shouldn't issue an injunction based on speculation as to what dominoes may fall in the future or with future claims if Duff is ultimately successful in having the changes to the Nominating Commission invalidated under Article III, section 29. Its focus is on the only plaintiff here, Duff, who can obtain the same relief he seeks with or without out a temporary injunction.

B. Enjoining Publication of Challenged Provisions.

Duff also seeks an injunction enjoining the publication, or codification, of the challenged portions of SF 638 regarding changes to the Nominating Commission. He is concerned that without such an injunction, his challenge will be mooted. The Iowa Supreme Court has held that codification of new legislation cures any alleged constitutional defect in title or subject matter. *State v. Mabry*, 460 N.W.2d 472, 475 (Iowa 1990). There is nevertheless a window of time that the legislation may be challenged as violative of Article III, section 29 of the Iowa Constitution, measured from the date legislation is passed until such legislation is codified. *Id.* A successful challenge before codification invalidates the defective portion of the legislation not only for the benefit of the challenger but also for the benefit of others adversely affected. *Tabor*, 519 N.W.2d at 380. The constitutional challenge is preserved if filed after the law's effective date, but before its codification. *State v. Taylor*, 557 N.W.2d 523, 526 (Iowa 1996). Duff's Petition fits within this window. Therefore, the court need not enjoin the codification of the challenged provisions in order for Duff to preserve his constitutional challenge under Article III, section 29.

V. ORDER

For the reasons stated above,

IT IS THEREFORE ORDERED that as to Counts I and II of the Plaintiff's Petition, the Defendants' Motion to Dismiss is **DENIED**.

IT IS FURTHER ORDERED that as to Count III of the Plaintiff's Petition, the Defendants' Motion to Dismiss is **GRANTED**.

IT IS FURTHER ORDERED that the Plaintiff's request for a temporary injunction is **DENIED**.



State of Iowa Courts

Case Number
CVCV058894

Case Title
THOMAS J DUFF VS GOVERNOR KIMBERLY K
REYNOLDS ET AL
Type: OTHER ORDER

So Ordered

Joseph Seidlin, District Court Judge
Fifth Judicial District of Iowa

Electronically signed on 2019-10-22 14:54:13